SUPREME COURT, U. S.

No. 73-902

FILED
MAR 6 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

FLORIDA MINING & MATERIALS CORP.,
d/b/a McCORMICK CONCRETE COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 40-50) is reported at 481 F. 2d 65. The decision and order of the National Labor Relations Board in the unfair labor practice proceeding (Pet. App. 28-39) are reported at 198 NLRB No. 81. The Regional Director's report on objections (Pet. App. 15-24) and the Board's decision (Pet. App. 25-27) in the underlying representation election proceeding are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 52) was entered on November 1, 1973. The petition for a writ of certiorari was filed on December 8, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly found that a local union's failure to disclose that it had been placed in a temporary trusteeship on the day before a representation election was insufficient grounds for setting aside the election.

2. Whether the Board properly refused to hold an evidentiary hearing on the employer's objections to the election.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act and the Board's Rules and Regulations are set forth at Pet. App. 53 and 59.

STATEMENT

A. The Proceedings Before the Board

On August 17, 1971, the Board's Regional Director approved a Stipulation for Consent Election, executed by the Company and Local 512,[1] and scheduled an election for September 23, which Local 512 subsequently won (Pet. App. 15-16). The day before the election, Local 512 received notice from the International Union that it had been placed under temporary trusteeship pending a hearing to consider evidence on whether the trusteeship should be continued or dissolved (Pet. App. 19; A. 28-29).[2]

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[1]Truck Drivers, Warehousemen & Helpers Local Union No. 512, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

[2]"A." refers to the appendix to the briefs in the court below.

After the election the Company filed timely objections, alleging that Local 512 had been placed in trusteeship the day before the election "without the knowledge or consent of [the unit employees]"; that in light of the trusteeship the Union had misrepresented that it "could adequately represent the employees"; and that the unit employees, when they voted, "erroneously assumed that they were casting their ballots for or against a certain labor organization * * * not under trusteeship" (Pet. App. 16-18; A. 16-17). Pursuant to Section 102.69(c) of the Board's Rules and Regulations (Pet. App. 59), the Regional Director conducted an administrative investigation, which revealed the following:

After the imposition of the temporary trusteeship, Local 512 continued its normal operations—*i.e.*, it continued to administer its contracts and to process grievances, including those filed before the trusteeship; it continued to refer employees to employers seeking drivers; and it continued to pay the salaries of its employees and to make payments on its debts (Pet. App. 20-21). At the time of the election, those Local 512 agents who were active in the campaign still held their positions. Although the trustee removed all the officers and business agents from their positions during the week following the election, one such agent, who was active in the election campaign, was rehired after two days and continued his usual functions (Pet. App. 21). Finally, at the hearing on the imposition of the trusteeship, the trustee recommended that the existence of Local 512 as a distinct local be maintained in light of the wishes of its membership (Pet. App. 20).

Based upon the foregoing, the Regional Director concluded that "Local 512, although presently under a trusteeship, is nonetheless continuing to function as Local 512, and as a part of the Teamsters Union," and that it "was able and willing both before and after imposition of trusteeship, to represent employees as their bargaining representative with respect to this [Company]" (Pet. App. 22). He therefore recommended that Local 512 be certified (Pet. App. 23-24). The Company's subsequent exceptions to the Regional Director's report (A. 22-23) were overruled by the Board, which adopted the Director's findings and recommendations and certified Local 512 (Pet. App. 25-27).

The Company thereafter refused Local 512's requests to bargain. In the ensuing unfair labor practice proceeding, the Board granting the General Counsel's motion for judgment on the pleadings, held that the Company had violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 512 (Pet. App. 33-34). The Board's order requires the Company, *inter alia*, to bargain with Local 512 upon request (Pet. App. 37).

B. The Decision of the Court of Appeals

The court of appeals enforced the Board's order. It accepted "the Board's finding that this union was able to represent these employees while in trusteeship and that any statements prior to the imposition of the trusteeship which indicated that the union could adequately represent these employees could not be considered material misrepresentations" (Pet. App. 47).

The court further held that it was not unreasonable for the Board to conclude that imposition of the trusteeship on the eve of the election was not such a

significant event as to require that the election be set aside because of the Union's failure to disclose it. The court pointed out that "[t]his local had been constantly beset by strife," that only "a few years earlier it had been placed in trusteeship by the International for internal problems," and that therefore "the imposition of the trusteeship under these circumstances was somewhat anticlimactic" (Pet. App. 48). The court added (Pet. App. 49):

> While the imposition of a trusteeship has serious consequences which have resulted in strict controls being imposed by Congress, in many important ways the local membership is not affected. The former heads of a local are generally replaced but the membership still retains its vote on contract terms and strikes. The trusteeship is designed to be temporary in nature, ceasing when the local's affairs have been sufficiently straightened out to allow it to return to a great degree of self-government.

ARGUMENT

1. The basic question which petitioner seeks to present (Pet. 7-12)—whether the representation election should have been set aside because of the undisclosed imposition of a trusteeship on the day before the election—"may well be a unique problem" (Pet. App. 47). As the court below pointed out (Pet. App. 47-48):

> Had the trusteeship been imposed a day or two sooner its existence would have almost certainly been publicly known prior to the election. * * *

> Had the notice of trusteeship been received on the day following the union's victory at the polls, it would be highly unlikely that a rerun election would be proper. Furthermore, there would be no rerun available for employees one month, six months, and so forth, after election if their local were to be put in trusteeship. * * *

Moreover, the Board and court found that, despite imposition of the trusteeship, Local 512 was fully able to perform its functions as a bargaining agent and that therefore its failure to disclose the trusteeship did not constitute a misrepresentation of its ability to represent the employees. The court further found that the Local's internal problems which led to the trusteeship were well known, and thus lack of disclosure thereof did not prevent the employees from knowing about the Local's difficulties.[3]

In these circumstances, the Board was warranted in concluding that the failure of Local 512 to disclose the trusteeship before the election did not vitiate the election results. In any event, the issue does not warrant further review because it is "a unique problem" (Pet. App. 47) unlikely to recur.

2. There is no merit to petitioner's additional contention (Pet. 12-13) that it was improperly denied an evidentiary hearing on its objections to the election. Petitioner tendered to the Board, in support of its exceptions to the Regional Director's ruling on its

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[3]At the time of the election, Local 512 knew only that its parent body was imposing a temporary trusteeship until a hearing could be held to examine the Local's internal difficulties. The Local did not then know whether, or to what extent, its officers and agents, who were still functioning, would be removed by the trustee (*supra*, p. 3).

objections, a form affidavit signed by three employees wherein they stated that they had voted for the Local but would not have done so if they "had been told before the election that the Local had been taken over by the International Teamsters in a trusteeship" (A. 46). The affidavit also stated: "We had understood that there was going to be a meeting the night of September 22, the night before the election. This meeting was cancelled" (*ibid.*).

Insofar as the affidavit described the employees' subjective reasons for voting, it is "unreliable." *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575, 608. Insofar as the affidavit was intended to show that the Local had concealed the trusteeship by cancelling a scheduled meeting on the eve of the election, it was untimely. The Board's Rules (29 C.F.R. 102.69(a)) require that objections must be filed within 5 days after the tally of ballots is issued, and that the objecting party shall promptly furnish to the Regional Director the evidence available to it ot support the objections. Petitioner did not furnish the affidavit to the Director—although the information therein was available—but instead waited until the Director had ruled, and then filed the affidavit in its exceptions to the Board.

Moreover, the objections which petitioner did file with the Director (Pet. App. 16-19, A. 16-17) merely asserted that the trusteeship was imposed without the em ployees' knowledge or consent, that the trusteeship rendered Local 512 incapable of adequately representing the employees, and that in casting their ballots the employees anticipated being represented by particular union officials. Since the facts bearing on these

contentions were undisputed, the Regional Director properly concluded that a hearing was unnecessary (Pet. App. 23).[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]The court below added that, in any event, it "seriously doubt[ed]" whether the cancellation of a scheduled union meeting would constitute "a material misrepresentation under the circumstances of this case" (Pet. App. 46-47).